UNITED STATES OF AMERICA
BEFORE THE NATIONAL LABOR RELATIONS BOARD
REGION 19

AUSTIN MAINTENANCE AND
CONSTRUCTION, INC.[1]

Employer

and Case 19-RC-14111

WESTERN ALASKA BUILDING AND
CONSTRUCTION TRADES COUNCIL,
AFL-CIO[2]

Petitioner

DECISION AND DIRECTION OF ELECTION

Upon a petition duly filed under Section 9(c) of the National Labor Relations Act, as amended, a hearing was held before a hearing officer of the National Labor Relations Board, hereinafter referred to as the Board.

Pursuant to the provisions of Section 3(b) of the Act, the Board has delegated its authority in this proceeding to the undersigned.

Upon the entire record[3] in this proceeding, the undersigned finds:

1. The hearing officer's rulings made at the hearing are free from prejudicial error and are hereby affirmed.

2. The Employer is engaged in commerce within the meaning of the Act and it will effectuate the purposes of the Act to assert jurisdiction herein.

3. The labor organization involved claims to represent certain employees of the Employer.

4. A question affecting commerce exists concerning the representation of certain employees of the Employer within the meaning of Section 9(c)(1) and Section 2(6) and (7) of the Act.

5. The following employees of the Employer constitute a unit appropriate for the purpose of collective bargaining within the meaning of Section 9(b) of the Act:

> All employees employed by the Employer at its Nikiski, Alaska, jobsite, including safety inspectors; but excluding all office clerical employees, and guards and supervisors as defined by the Act.[4]

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[1] The name of the Employer appears as corrected at hearing.
[2] The name of Petitioner appears as corrected at hearing.
[3] The parties filed briefs, which have been considered, except that the attachments to the Employer's brief are not part of the record herein and were not considered.
[4] While there is no formal acknowledgement by the parties in the record that the unit sought by Petitioner is an appropriate unit, there is no dispute that it is not, except for the Employer's contention that safety inspectors should be included.

The Employer is engaged in the construction of a gas-to-liquids test facility located in Nikiski, Alaska. Petitioner seeks a unit of all employees employed on the project. The Employer contends that foremen are statutory supervisors, and that safety inspectors should be included in the unit. Further, the Employer contends that Petitioner is not a labor organization within the meaning of Section 2(5) of the Act. In addition, the Employer contends that the petition should be dismissed because the project will be ending in the near future, and the Employer has no other work in Alaska.

Labor organization.

Petitioner is an organization of 17 local unions in the building and construction trades industry. Vince Beltrami, president of Petitioner, testified that one of the purposes of Petitioner is to enter into collective bargaining agreements with employers. There are three such agreements in the record, between Petitioner and Alaska Manufacturing Contractors, covering three projects. Petitioner conducts regular meetings of its constituent local union members. Employees pay dues to the local unions, and elect the officers thereof.

The Board has found similarly structured labor councils to be labor organizations within the meaning of the Act. See, for example, *Dezcon, Inc.,* 295 NLRB 109 (1989). Inasmuch as Petitioner exists at least in part for the purpose of dealing with employers regarding employees' working conditions, and employees are members of Petitioner's constituent local unions, I conclude that Petitioner is a labor organization within the meaning of Section 2(5) of the Act.[5]

Expected duration of the project.

Construction commenced on the project on February 19, 2001. The target date for completion of the project is January 15, 2002, but the Employer's evidence establishes that some work will extend beyond that date, including startup, commissioning, and testing, and there will be some Unit employees working until about April 1, 2002. At the time of the hearing there were about 100 Unit employees. The Employer expected to hire additional employees, up to a maximum of about 180 in late July and early August, after which the number of employees would start decreasing. There is no evidence that the Employer has any other work in Alaska, nor any pending bids.

The Employer contends that because the Nikiski project will be completed in seven to ten months, no useful purpose would be served by conducting an election herein. In this regard, the Employer cites *Longcrier Company*, 277 NLRB 570 (1985); *Martin Marietta Aluminum*, 214 NLRB 646 (1974); *M.B. Kahn Construction*, 210 NLRB 1050 (1974); *Frazer-Brace Eng'g Co.,* 38 NLRB 1263 (1942); and *Davey McKee Corp*., 308 NLRB 839 (1992).

In *Longcrier*, at the time the Board determined that it would be futile to direct an election, there had been no project in existence and no unit employees employed for about ten months. In *Martin Marietta*, the Employer was in the process of closing the plant and had laid off a

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[5] Section 2(5) of the Act defines a "labor organization" as:

> [A]ny organization of any kind, or any agency or employee representation committee or plan, in which employees participate and which exists for the purpose, in whole or in part, of dealing with employers concerning grievances, labor disputes, wages, rates of pay, hours of employment, or conditions of work.

substantial number of employees at the time the petition was filed. Plant closure had been publicly announced as set for August 31, 1974, about two months prior to the Board decision, which issued on November 5, 1974, dismissing the petition.

In *Kahn*, a hearing was held in December 1973; the unit was expected to cease to exist by June 1974, only one month after the Board dismissed the petition in May 1974. In *Fraser-Brace*, the Board found on February 16, 1942, that where the unit employees would all be laid off only one month later, no purpose would be served by conducting an election. In *Davey McKee*, the Board denied review of the Regional Director's decision to dismiss the petition where there were only 29 days from the date the hearing closed to the date on which the relevant projects would end.

Thus, in all of the Board cases cited by the Employer, at the time the Board issued its decision, the unit had already ceased to exist, or would cease only about one month later. In none of these cases did the Board say that the petition should have, or should not have, been dismissed earlier; only that it was "too late" by the time the Board issued its decision.

In *Norfolk Maintenance Corporation*, 310 NLRB 527 (1993), the Board upheld the Regional Director's direction of an election where the unit would cease to exist seven months after the issuance of the Regional Director's decision. This case is precisely on point.

Inasmuch as here, the project is not expected to be completed until January 15, 2002, and some employees will still remain on the job until the beginning of April, 2002, I conclude that there is sufficient time in which to conduct an election and for meaningful bargaining to occur. I shall, therefore, direct an election.

Supervisory issue.

The Nikiski project is under the overall direction of a project manager and a general superintendent. Reporting to the general superintendent are craft superintendents. The foremen at issue report to general foremen, who in turn report to the craft superintendents. The foremen each have five to ten employees on their crews.

The Employer's witness Joe McKee, a vice president of the Employer, testified that foremen are given a three-week "look ahead" plan on a weekly basis, which shows what the crew is supposed to be doing during the current week and what it will be doing the next week.[6] No examples of such "look aheads" were offered into the record. McKee said that foremen use the "look ahead" to plan and assign work, and to schedule employees. He testified that foremen sign the time sheets for employees and can give an employee permission to leave early, and that foremen have authority to issue written warnings, although he did not know whether any foremen on the jobsite had done so. McKee testified that foremen can recommend pay increases, and can recommend that more employees be hired, but there is no specific supporting evidence.[7] He said that as the work slows down, the foremen will select the employees to be laid off, but there is no specific supporting evidence.[8]

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[6] The record is a bit fuzzy about a "third" week.

[7] For example, were recommendations made? What happened to them?

[8] For example, how will they decide? Will they have total, unreviewed authority?

McKee admitted that his testimony was based on his general knowledge of how the Employer operates, and not on any direct knowledge or observations at the Nikiski site,

Petitioner's witness Kenneth Agosta, who was formerly employed as a foreman, testified that he assigned crew members to specific tasks according to his knowledge of the individual crew members. He also said that he gave crew members the opportunity to choose which tasks they wanted to do, on a daily basis. He said that he had recommended to the general foremen that a few employees on his crew be promoted from helper to carpenter, but they were not promoted. He said that when he was foreman, he had two crew members who wouldn't work, and he told them to go somewhere else on the jobsite. Agosta said he was "afraid" to reprimand or discipline employees, because another foreman had reprimanded an employee who had then complained to the superintendent, who came back and "yelled at" the foreman. Agosta said that he had talked to Mario Gonzales about three men he thought should be fired, but they were not fired; Gonzales is the safety manager, and is outside Agosta's "chain of command." Agosta said he did not have authority to grant time off, but he also said he had signed "early out" permits for employees to leave the jobsite early. During his approximately 15 weeks as a foreman, Agosta was given a three-week "look ahead" on only one occasion. He described it as not being practicable, that everything was changed or pushed back. He said that he verified the employees' time records and signed them.[9]

A second Petitioner witness, Allen Peterson, had been a foreman for about five weeks prior to the Friday before the hearing. He said that he had never received a three-week "look ahead" when he was foreman. He assigned tasks to employees, but sometimes they refused to do the tasks; when that happened he told them to "stand aside."[10] The general foreman told him to tell such employees to "go sit in the tent." He said that, "If they wanted to take a walk, they took a walk." He said he had no authority to discipline employees. He explained that once an employee had arrived at the jobsite, they had to stay unless they had written permission to leave. As foreman, he could not require employees to stay, and he signed permission slips for employees to leave early a few times every day. He kept the time sheet for the employees, writing down their hours and what they did. He recommended to the general foreman that some employees be laid off because they weren't doing any work, but the employees were not laid off.

Section 2(11) of the Act defines a "supervisor" as:

> . . .[A]ny individual having authority, in the interest of the Employer, to hire, transfer, suspend, lay off, recall, promote, discharge, assign, reward, or discipline other employees, or responsibly direct them, or to adjust their grievances, or effectively recommend such action, if in connection with the foregoing the exercise of such authority is not of a merely routine or clerical nature, but requires the use of independent judgment.

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which he has visited only six times since it began. He said that the Nikiski project is operated like all the Employer's other projects, but there is no specific evidence in support of his testimony in this regard, nor any specific evidence as to any direct knowledge he has about the authority of foremen on any of the Employer's projects.

[9] Following Agosta's direct examination, the parties in the hearing discovered that during his testimony he had been referring to notes he had made during McKee's testimony of what Agosta called "misstatements."

[10] The record does not reflect the consequence of "standing aside." Discipline? Taken off the clock? Wait while other work is found?

The legislative history of Section 2(11) indicates that Congress intentionally distinguished between "straw bosses, leadmen, set-up men, and other minor supervisory employees, on the one hand, and the supervisor vested with such genuine management prerogatives as the right to hire, fire, discipline, or make effective recommendations with respect to such actions. Thus, a "leadman" or "straw boss" may give "minor orders or directives or supervise the work of others, but he is not necessarily a part of management and a 'supervisor' within the Act." *George C. Foss Co*., 270 NLRB 232 (1984).

The Fourth Circuit Court of Appeals said in *NLRB v. Southern Bleachery & Print Works*, 257 F.2d 235, 239 (1958), "It is a question of fact in every case as to whether the individual is merely a superior workman or lead man who exercises the control of a skilled worker over less capable employees, or is a supervisor who shares the power of management." (Cited in *Spring Valley Farms, Inc*., 272 NLRB 1323 (1984).)

The Employer contends that foremen assign work, that is, that they schedule employees and assign specific tasks to employees on a daily basis, that they have authority to recommend pay increases, and authority to discipline. The Employer's contentions are not supported by the record. The record does not establish that foremen schedule employees. McKee's testimony was a collection of generic testimony of what he thought should be happening, but little actual first-hand knowledge of what *was* happening. Moreover, his generalized testimony that foremen are given a "look ahead" on a weekly basis and use it to schedule employees is negated by Agosta's and Peterson's first-hand testimony that they, themselves, were not given such documents on a weekly basis, and there is no other evidence that foremen schedule employees.[11] Moreover, there is no evidence how the "look ahead" would be used to "schedule." Would employees self-select available work? Would the scheduling involve more money or layoffs? Was the work routine, such that anyone could do it, or did the assignment of a worker require evaluation? There is no evidence that the foremen's signing of permission slips for employees to leave the jobsite early amounts to any statutory supervisory authority, as Peterson testified that he could not require employees to stay. There is no specific evidence that foremen have authority to recommend pay increases, other than McKee's conclusionary testimony in that regard.[12] Would such a recommendation, if made, be followed? Without independent investigation and/or knowledge? Agosta testified that his recommendation that some members of his crew be promoted from helper to carpenter went unheeded.

Both Agosta and Peterson said that they could not discipline employees. Agosta even gave an example of another foreman being reprimanded for having disciplined an employee. On brief, the Employer asserts that by telling employees who refused to perform tasks as assigned to stand aside or to go somewhere else on the jobsite, Agosta and Peterson were disciplining those employees. The contention that such instructions amounted to discipline is unsupported by the record as there is no evidence that such instructions to employees had any effect on the

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[11] Whenever evidence is in conflict or otherwise inconclusive on particular indicia of supervisory authority, the Board will find that supervisory status has not been established, at least not on the basis of those indicia. *International Center for Integrative Studies/The Door*, 297 NLRB 601 (1990).

[12] Mere inference or conclusionary statements without supporting evidence are insufficient to establish supervisory status. *Sears, Roebuck & Co.,* 304 NLRB 193 (1991); *Quadrex Environmental Company, Inc.*, 308 NLRB 101 (1992).

employees' employment status. In particular, there is no indication that they lost hours as a result, or that a "mark" was made on their record. *Azuza Ranch Market*, 321 NLRB 811 (1996).

Both Agosta and Peterson said that as foremen they assigned specific tasks to employees. Agosta said he made such assignments according to his knowledge of the individual crew members, and that he gave them the opportunity to choose which tasks they wanted to do. However, both Agosta and Peterson also testified that employees sometimes refused to perform the assigned tasks, and the foremen could not penalize them for their refusal. Clearly, with respect to assigning tasks, the foremen do not "share the power of management."

I conclude that the Employer has failed to meet its burden in establishing that foremen are statutory supervisors.[13] McKee's testimony is entirely conclusionary, unsupported by any specific examples. The testimony of Agosta and Peterson does not establish that they were anything more than "straw bosses." I therefore find that on this record foremen have not been shown to be statutory supervisors.

Unit issue.

There are three safety inspectors in addition to safety manager Mario Gonzales, a conceded supervisor. Gonzales reports directly to the project manager. The safety inspectors are former craftspeople who have been trained in safety techniques. The record does not reveal the nature or duration of such training. Gonzales attended a year-long training program. They conduct daily audits of work on the jobsite, looking for safety compliance and safety equipment violations. As such, they spend most of their time in the areas where the conceded Unit employees work. They alert employees to the need to USE safety equipment, such as safety glasses. If they identify a deliberate violation of safety rules, the general foreman is notified and the employee may get a written warning. On their tours of the jobsite, they are each accompanied by a Unit member. There is no specific evidence regarding interactions between the safety inspector and the crew member. There is no evidence that safety inspectors ever perform any construction work on the jobsite.

If the safety inspectors were omitted from the Unit, they would be the only non-represented employees on the job, with the exception of perhaps some office clerical employees. As such, they would constitute a small fragmentary group of un-represented employees. No other labor organization seeks to represent them.

Inasmuch as it would not be inappropriate to include the safety inspectors -- such a unit would be, in essence, an all-employee unit, a presumptively appropriate unit -- and they would otherwise potentially constitute a small fragmentary unrepresented group, I conclude it inappropriate to exclude the safety inspectors, so I shall include them.

There are approximately 163 employees in the Unit.[14]

DIRECTION OF ELECTION

[13] The burden of proving statutory supervisory status falls upon the party asserting such status. *Kentucky River Community Care*, 532 U.S. ___ (2001).

[14] In accordance with Employer's Exhibit No. 1.

An election by secret ballot shall be conducted by the undersigned among the employees in the unit found appropriate at the time and place set forth in the notice of election to be issued subsequently, subject to the Board's Rules and Regulations. Eligible to vote are those in the unit who were employed during the payroll period ending immediately preceding the date of this Decision including employees who did not work during that period because they were ill, on vacation, or temporarily laid off, and those in the Unit who have been employed for 30 working days or more within the 12 months preceding the eligibility date for the election, or had some employment during those 12 months and have been employed for 45 working days or more within the 24-month period immediately preceding the eligibility date, excluding those who have quit voluntarily or have been terminated for cause prior to the completion of the last job for which they were employed. Also eligible are employees engaged in an economic strike which commenced less than 12 months before the election date and who retained their status as such during the eligibility period and their replacements. Those in the military services of the United States may vote if they appear in person at the polls. Ineligible to vote are employees who quit voluntarily or were discharged for cause prior to the completion of the last job for which they were employed, employees engaged in a strike who have been discharged for cause since the commencement thereof and who have not been rehired or reinstated before the election date, and employees engaged in an economic strike which commenced more than 12 months before the election date and who have been permanently replaced. Those eligible shall vote whether or not they desire to be represented for collective bargaining purposes by WESTERN ALASKA BUILDING & CONSTRUCTION TRADES COUNCIL.

NOTICE POSTING OBLIGATIONS

According to Board Rules and Regulations, Section 103.20, Notices of Election must be posted in areas conspicuous to potential voters for a minimum of three working days prior to the date of election. Failure to follow the posting requirement may result in additional litigation should proper objections to the election be filed. Section 103.20(c) of the Board's Rules and Regulations requires an employer to notify the Board at least 5 full working days prior to 12:01 a.m. of the day of the election if it has not received copies of the election notice. *Club Demonstration Services*, 317 NLRB 349 (1995). Failure to do so estops employers from filing objections based on nonposting of the election notice.

LIST OF VOTERS

In order to assure that all eligible voters may have the opportunity to be informed of the issues in the exercise of their statutory right to vote, all parties to the election should have access to a list of voters and their addresses that may be used to communicate with them. *Excelsior Underwear*, 156 NLRB 1236 (1966); *NLRB v. Wyman-Gordon Co*., 394 U.S. 759 (1969). Accordingly, it is hereby directed that an election eligibility list, containing the alphabetized full names and addresses of all the eligible voters, must be filed by the Employer with the Resident Officer in Anchorage within 7 days of the date of this Decision and Direction of Election. *North Macon Health Care Facility*, 315 NLRB 359, 361 (1994). The list must be of sufficiently large type to be clearly legible. The Region shall, in turn, make the list available to all parties to the election.

In order to be timely filed, such list must be received in the Anchorage Resident Office, 222 West 7th Avenue, Box #21, Anchorage, Alaska 99513, on or before July 10, 2001. No extension of time to file this list may be granted except in extraordinary circumstances, nor shall the filing of a request for review operate to stay the filing of such list. Failure to comply with this requirement shall be grounds for setting aside the election whenever proper objections are filed.

The list may be submitted by facsimile transmission to (907) 271-3055. Since the list is to be made available to all parties to the election, please furnish a total of 4 copies, unless the list is submitted by facsimile, in which case only one copy need be submitted.

RIGHT TO REQUEST REVIEW

Under the provisions of Section 102.67 of the Board's Rules and Regulations, a request for review of this Decision may be filed with the National Labor Relations Board, addressed to the Executive Secretary, 1099 14th Street N.W., Washington, D.C. 20570. This request must be received by the Board in Washington by July 17, 2001.

DATED at Seattle, Washington this 3rd day of July, 2001.

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Paul Eggert, Regional Director
National Labor Relations Board, Region 19
2948 Jackson Federal Building
915 Second Avenue
Seattle, Washington 98174

177-8580-1500
177-3950-4500
347-8020-8050
420-7390